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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

MARK REEDER,
Petitioner,

vs.

KANSAS CITY BOARD OF POLICE COMMISSIONERS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. IS A STATE STATUTE THAT INVIDIOUSLY DISCRIMINATES AGAINST CERTAIN INDIVIDUALS EXEMPT FROM REVIEW UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IF THE DISCRIMINATION IS IMPOSED ON A GEOGRAPHIC BASIS?

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri is not officially reported. It is, however, set forth in Appendix A to this Petition. The opinion of the United States Court of Appeals for the Eighth Circuit is not yet officially reported (at least as of the date of the printing of this brief). The Court of Appeals' opinion appears in Appendix B to this Petition.

JURISDICTION

The judgment of the United States District Court for the Western District of Missouri was filed on July 2, 1985. Respondents herein timely filed their notice of appeal, appealing that judgment to the United States Court

of Appeals for the Eighth Circuit. On July 21, 1986, the Eighth Circuit handed down its opinion, reversing the district court's judgment. Thereafter, a timely Petition for Rehearing *en banc* was filed with the Eighth Circuit by Petitioner herein and was overruled on August 28, 1986. This Court's jurisdiction is bestowed by 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved: R.S.Mo. §84.830 (1978), and the Fourteenth Amendment to the United States Constitution. The pertinent portions thereof are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner joined the Kansas City Police Department in January of 1972. He served as a patrolman until May of 1980 when he was promoted to the rank of Sergeant. That promotion was considered to be rapid, given the length of Petitioner's service at that time.

During Petitioner's service as a police officer, he received a number of letters of commendation. As recently as December 6, 1984, Petitioner received a handwritten note from the Chief of Police, commending Petitioner and urging him to "keep up the good work." On August 30, 1980, Petitioner was evaluated by his Captain for, *inter alia,* integrity. Petitioner was given the very highest rating for integrity. Similar ratings were entered on November 29, 1980, February 27, 1981, and April 25, 1981.

> On August 22, 1980, Petitioner's Captain reported that:
>
> Sergeant Reeder is a very efficient supervisor and leader who possesses outstanding enthusiasm and treats his job with a great deal of dedication. I feel he will develop into one of the strongest field supervisors on this department.

On November 25, 1980, that same Captain once again praised Petitioner. On April 29, 1981, he reiterated that Petitioner was "a very good supervisor and always has the interests of the Police Department in mind." These were not the only commendations received by Petitioner, but they are representative of his personnel file.

No one has claimed the Petitioner ever arrested or failed to arrest anyone on the basis of his political beliefs. No one ever accused Petitioner of exerting any influence on the officers under his command to support a particular candidate for office.

In July of 1982 Petitioner voluntarily contributed $500 of his own money to the Carnes for Congress Committee, a committee supporting the candidacy of a person seeking the Democratic nomination for United States Representative from Missouri's Fifth District. When he made his contribution, Petitioner was unaware of the existence of R.S.Mo. §84.830.1 (1978), which prohibits contributions for "any political purpose whatever." The statute further provides that any officer making such a contribution "shall be discharged forthwith . . . ." §84.830.7.

As a result of the contribution, departmental charges were filed against Petitioner, seeking his dismissal. Upon initiation of those charges Petitioner filed suit in the United States District Court for the Western District of Missouri, seeking to enjoin his discharge. Petitioner's

complaint alleged that §84.830 was preempted by the Federal Election Campaign Act, 2 U.S.C. §453; that the statute violated the First Amendment to the United States Constitution; and that the statute violated the Equal Protection Clause to the Fourteenth Amendment because it only restricted the rights of Kansas City police officers while placing no similar restrictions on other Missouri police officers.

The district court found in Petitioner's favor on February 25, 1983, holding that §84.830 was preempted by 2 U.S.C. §453, and that it violated Petitioner's First Amendment rights. The district court did not consider Petitioner's equal protection claim.

Thereafter, Respondents[1] appealed the district court's judgment to the Eighth Circuit. In 1984 that Court reversed the district court's judgment, holding that §84.830 was not preempted by 2 U.S.C. §453 and that it passed First Amendment muster, *Reeder v. Kansas City Board of Police Commissioners,* 733 F.2d 543. Since the district court had not addressed Petitioner's equal protection argument, the case was remanded for consideration of that issue.

On July 2, 1985, the district court again found in Petitioner's favor. The court held that because the classification created by §84.830 impinged on a fundamental right —*viz.* the right to make political contributions—it was subject to strict scrutiny. The district court further held

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1. The parties whom Petitioner sought to enjoin are Respondents herein. They are Arthur D. Brookfield III, John L. Williams, Beverly Barker, Richard L. Berkeley, and William Birt, constituting the Kansas City Board of Police Commissioners, the body having responsibility for administering the Kansas City Police Department. Additionally, Larry L. Joiner, current Chief of Police is also a Respondent.

that Respondents failed to satisfy their burden of showing that the classification created thereby was necessary to the achievement of a compelling state interest.

The Eighth Circuit reversed again on July 21, 1986, holding that because Missouri limited its restriction on political contributions by police officers along territorial lines, the classification was wholly outside the protection of the Equal Protection Clause. The Court denied Petitioner's Petition for Rehearing *en banc* on August 28, 1986.

REASONS FOR GRANTING WRIT

The District Court determined that §84.830 violates the Equal Protection Clause of the Fourteenth Amendment because it singled out Kansas City police officers in restricting the exercise of their fundamental right to make political campaign contributions. The Eighth Circuit reversed on the ground that the restrictions contained in the statute were imposed on a geographic basis so that the Fourteenth Amendment is wholly inapplicable. Before responding directly to the Eighth Circuit's holding, Petitioner would note the premises underlying his equal protection claim.

It is a matter of black letter law that not all differences in the application of laws violate the Equal Protection Clause; it is *invidious* discrimination that is primarily offensive to constitutional norms, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). A classification is presumptively invidious if it burdens a suspect class or impinges upon the exercise of a fundamental right, *Plyler v. Doe*, 457 U.S. 202 (1982).

Invidiousness has a profound effect on the level of scrutiny to which a statute will be subjected under the

Equal Protection Clause. Where a statutory classification does not discriminate against a suspect class or trammel fundamental personal rights, the statute is presumptively constitutional and the appropriate standard of judicial review is the traditional minimal rationality test, *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). If, however, the classification is invidious, a different standard of scrutiny applies. When a State statute classifies individuals in terms of their ability to exercise a fundamental right, then the classification is subject to strict constitutional scrutiny, *Dunn v. Blumstein,* 405 U.S. 330, 336-337 (1972), and *Kramer v. Union Free School District,* 395 U.S. 621, 626 (1969). Where, for example, the classification burdens the exercise of First Amendment rights, "the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized," *Carey v. Brown,* 447 U.S. 455, 461-462 (1980). In such cases it is not sufficient that the classification is rationally related to a legitimate state interest; the differential treatment must be "*necessary* to the achievement of a *compelling* state interest," (emphasis in original) *Dunn v. Blumstein, supra,* 405 U.S., at 342.

It is important in this regard to distinguish between a First Amendment attack on a statute and an equal protection attack. It is conceivable that a statute which restricts speech may nonetheless pass the exacting scrutiny applied in First Amendment cases. However, if the statute only burdens the First Amendment rights of certain groups, then it must survive an additional test of strict scrutiny to justify the *differential treatment.*

The classic distinction between a First Amendment and an equal protection challenge was made in *Police De-*

partment of the City of Chicago v. Mosley, 408 U.S. 92 (1972). In that case the City of Chicago prohibited all picketing within 150 feet of a school during school hours except in those instances where the picketer was involved in a labor dispute. The Supreme Court noted that Chicago could place reasonable restrictions on picketing under certain circumstances and not run afoul of the First Amendment. The Court went on to note that selective application of those restrictions might also be valid under the Equal Protection Clause. However:

> these justifications for selective exclusions from a public forum must be carefully scrutinized. Because picketing plainly involves expressive conduct within the protection of the First Amendment [citations omitted], *discriminations among pickets must be tailored to serve a substantial governmental interest.*

(Emphasis added.) 408 U.S., at 98-99. Because Chicago had no adequate interest in prohibiting non-labor picketing while permitting picketing by those engaged in labor disputes, its ordinance violated the Equal Protection Clause.

Since the right to make political campaign contributions lies at the core of the First Amendment, *Buckley v. Valeo,* 424 U.S. 1, 22-23 (1976), *Abood v. Detroit Board of Education,* 431 U.S. 209, 234 (1977), the district court held that the classification in §84.830 was subject to strict scrutiny. It further held that Respondents failed to meet their burden to show that the discriminatory treatment of Kansas City police officers was necessary to the achievement of a compelling state interest.

The Eighth Circuit never reached the question of whether §84.830 could withstand strict scrutiny. Instead, it held that because the classification was based on geo-

graphic lines—i.e. it affects the rights of people on the basis of their location—no interests protected by the Equal Protection Clause are implicated. The heart of the Eighth Circuit's decision is thus stated:

> We reverse, finding that under the precedents of the Supreme Court a statute which discriminates between the political subdivisions of a state does not offend the Equal Protection Clause. That clause protects people, not places. So long as the statute treats the same all persons who are similarly situated, i.e., those who are within its jurisdictional reach, regardless of the fact that other statutes apply to other parts of the state, there is no ground for a challenge under the Equal Protection Clause. We therefore need not analyze the statute under the strict scrutiny standard which would otherwise apply when a regulation touches the exercise of fundamental rights. Indeed, under the controlling precedents, this kind of geographical distinction is simply not subject to traditional equal protection analysis.

Slip Opinion at 2. The stark issue presented by the Eighth Circuit's holding is this: Is invidious discrimination by a State against some of its citizens wholly outside the scope of the Equal Protection Clause if it is imposed on a geographic basis? Petitioner would respectfully submit that this issue must be resolved negatively.

In this regard Petitioner believes that the Eighth Circuit's Opinion flies in the face of the classic "geographic discrimination" cases, those involving legislative reapportionment. While these cases are different factually from the instant case, their method of analysis illustrates the fallacies in the approach endorsed by the Eighth Circuit.

In *Gray v. Sanders,* 372 U.S. 368, 379-380 (1963), the Court held that under the Fourteenth Amendment the fundamental right to vote could not be diminished on the basis of the voter's geographic residence. That view was greatly amplified the following year in *Reynolds v. Sims,* 377 U.S. 533 (1964). In that case the Court recognized that the right to vote was a fundamental right, 377 U.S., at 561. The manner in which members of the Alabama legislature were selected greatly favored rural districts, thereby diminishing the votes of urban residents. Since the right diminished was a fundamental one, the Court held that the justification for discriminating against urban voters must be "carefully and meticulously scrutinized," *Ibid.,* at 562. If there was any question that discrimination in the exercise of a fundamental right on the basis of geographic residence was outside the scope of the Equal Protection Clause, that question was resolved conclusively in *Reynolds v. Sims*:

> To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overwhelming or diluting the efficacy of his vote.

Ibid., at 567.[2]

Petitioner would respectfully submit that this Court's holding in *Reynolds v. Sims* and the Eighth Circuit's Opinion at bar are mutually exclusive. There is no question that the Alabama legislative scheme discriminated between political subdivisions—*viz.* legislative districts—

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2. At another point in its Opinion the Court noted that, "there is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the States," *Ibid.,* at 558.

of the State. It also treated all persons within its jurisdictional reach—all residents of the same legislative district—the same. By the test announced in the Eighth Circuit's Opinion, the Alabama legislative scheme would never have been subject to review under the Equal Protection Clause. By the test announced in *Reynolds v. Sims* that scheme was void precisely because it constituted a form of "geographic discrimination" against the exercise of fundamental rights.[3]

The Eighth Circuit cites a number of venerable cases, beginning with *Missouri v. Lewis,* 101 U.S. 22 (1880), where this Court held that the Equal Protection Clause protects people and not places so that differential treatment based on geographic location was wholly without Fourteenth Amendment protection. The majority of those cases did not involve federally protected rights or were decided before the Equal Protection Clause was held to require strict scrutiny of classifications impinging on fundamental rights.

Ironically one of the newer cases cited by the Eighth Circuit—*Griffin v. School Board of Prince Edward County,* 377 U.S. 218 (1964)—bolsters Petitioner's position. In that case the State of Virginia enacted a legislative scheme that provided for integrated schools in every county but one, Prince Edward County. This scheme was accomplished by abolishing public schools in that county and providing public tuition grants for private schools. The respondents argued that since the Fourteenth Amendment does not require territorial uniformity, Virginia was free to treat different counties differently. This Court rejected that argument:

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3. In *Gordon v. Lance,* 403 U.S. 1, 5 (1971), the Court reiterated its abhorrence for "geographic discrimination."

> A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature "having in mind the needs and desires of each." *Salsburg v. Maryland,* 346 U.S. 545, 552 (1954). A State may wish to suggest, as Maryland did in *Salsburg,* that there are reasons why one county ought not to be treated like another. 346 U.S., at 553-554. But the record in the present case could not be clearer that Prince Edward's public schools were closed . . . for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not . . . go to the same school.

377 U.S., at 231. Since this was an invidiously discriminatory action, the Court held that the Virginia scheme violated the Equal Protection Clause.

The teaching of *Griffin* is clear. If a State imposes a classification along territorial lines that is designed to effectuate an invidious discrimination, then the classification *is* subject to strict scrutiny under the Equal Protection Clause.

In the case at bar the classification imposed by §84.830 is invidiously discriminatory because it infringes on a fundamental right, *Plyler v. Doe, supra,* 457 U.S., at 216-217.[4] *Griffin* requires that such an invidious discrimination be subjected to exacting scrutiny, regardless of its geographic limitations.

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4. Of course invidious discrimination is not limited to *racial* discrimination. The same level of scrutiny applies to classifications based on race and to those based on the ability to exercise a fundamental right, *Cleburne v. Cleburne Living Center,* 473 U.S. ....., 87 L.Ed.2d 313, 320 (1985).

The Eighth Circuit also cites *McGowan v. Maryland,* 366 U.S. 420 (1961). In that case the appellants attacked Maryland's Blue Laws on First Amendment and equal protection grounds. One of the equal protection challenges was based on the fact that some counties were exempted from the restrictions of the Blue Laws. The Court eschewed this attack on the ground that the Equal Protection Clause does not require territorial uniformity, 366 U.S., at 427. Since the classification in *McGowan* impinged on fundamental rights, the Eighth Circuit concluded that this Court's holding stands for the proposition that even classifications burdening federally protected rights are outside the Equal Protection Clause if the restrictions are imposed along territorial lines, Slip Opinion at 7-8.

The fallacy of reliance on *McGowan* is that it assumes that strict scrutiny under the Equal Protection Clause was argued by appellants and considered by the Court. There is simply no indication in *McGowan* that strict scrutiny analysis was ever advanced by the parties. Indeed, the section of *McGowan* discussing appellants' equal protection claim assumes the applicability of a minimum rationality test without even considering a higher level of scrutiny, 366 U.S., at 425-426.

Petitioner would submit the reason for the dearth of discussion about the appropriate level of review may be attributed to the state of the law when *McGowan* was decided. At that time classifications affecting fundamental rights were not considered to constitute a form of invidious discrimination. The intersection of equal protection and fundamental interest analysis is a comparatively recent development, postdating *McGowan, see*: the discussion in Justice Harlan's dissenting opinion in *Shapiro v. Thompson,* 394 U.S. 618, 660-661 (1969).

Petitioner would respectfully submit that this case presents a question of profound constitutional importance in interpreting the scope of the Equal Protection Clause. If the instant case were one in which Petitioner simply sought to protect places, as opposed to people, the Eighth Circuit's Opinion might be well taken. Unfortunately the the statute discriminates against the exercise of a citizen's fundamental right on the basis of the fact that he "lives here or there," *Reynolds v. Sims, supra.* It is the citizen who bears the burden of that discrimination—not the political subdivision.

Petitioner would submit that the question of whether *invidious* discrimination can be justified if imposed geographically requires a clear resolution by this Court. He would respectfully submit that by declining to subject invidious discrimination to review under the Equal Protection Clause, the Eighth Circuit has sanctioned a radical departure from constitutional norms. Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

(Filed July 2, 1985)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

MARK REEDER,	)	
Plaintiff,	)	
vs.	)	No. 82-0637-CV-W-5
KANSAS CITY BOARD OF POLICE COMMISSIONERS, et al.,	)	
Defendants.	)	

ORDER

Missouri law prohibits officers or employees of the Kansas City Police Department from making any financial contribution to a political party, political club, or any political purpose.[1] Plaintiff Mark Reeder, a sergeant with

1. Mo. Rev. Stat. § 84.830(1) states in relevant part as follows:

> Police department—prohibited activities—penalties (Kansas City)
>
> No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever.

Section 84.830 applies to Missouri cities with 300,000 to 700,000 inhabitants, Mo. Rev. Stat. § 84.350, but is specifically classified under the heading "PROVISIONS APPLICABLE TO KANSAS CITY." Only Kansas City falls in the specified population range. The statute expressly provides that any officer of the police department found by the police board to have violated this statute shall be discharged. Mo.Rev.Stat. § 84.830(7).

the Kansas City Police Department, contributed $500.00 to the campaign of a candidate for the Democratic Nomination for Missouri's Fifth District Congressional Representative. Reeder, who has remained employed by the Kansas City Police Department during the pendency of this litigation, brought this action pursuant to 42 U.S.C. § 1983 seeking injunctive relief against his threatened termination for violating § 84.830. Named as defendants are the Kansas City Board of Police Commissioners and the Chief of the Kansas City Police Department.

Previously, the Eighth Circuit Court of Appeals determined that the state statute was not preempted by Section 301 of the Federal Election Campaign Act Amendments, 2 U.S.C. § 453, and that the state statute did not abridge the plaintiff's freedom of speech guaranteed by the First Amendment as applied to states through the Fourteenth Amendment. The Eighth Circuit remanded this case for a determination of whether § 84.830, which applies to police officers in Kansas City only, satisfies the requirements of the Equal Protection Clause of the Fourteenth Amendment. In remanding, the Eighth Circuit noted that the defendants ought to be allowed to justify the disparity between Kansas City and other police departments in the state, and observed that "this kind of classification affecting as it does First Amendment rights, may require more than simply a rational basis to withstand constitutional attack." *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543, 549 (8th Cir. 1984). For the following reasons, the Court concludes that Mo. Rev.Stat. §84-830 fails to withstand strict scrutiny under the Equal Protection Clause.

I. *Facts and Historical Background of Mo.Rev.Stat. § 84.830*

An evidentiary hearing was held in connection with the equal protection issue. Although the parties disagree as to the appropriate legal conclusion, the facts relevant to the plaintiff's conduct are not in dispute and are set forth as follows.

Plaintiff Reeder is employed as a sergeant by the Police Department of Kansas City, Missouri, under the supervision of the Board of Police Commissioners. During July, 1982, while employed by the Police Department, the plaintiff made a political campaign contribution of $500 to a local candidate for Congress. The fact of plaintiff's contribution was published in a local newspaper, and as a result, the Chief of Police became aware of the plaintiff's action and charged the plaintiff with violating § 84.830. Unless enjoined, the Board of Police Commissioners will discharge the plaintiff from his employment.

The defendants, in seeking to justify the distinction created by the Missouri Legislature, presented the following historical argument in support of its theory. Although the Court does not adopt the defendants' assertions as findings of fact, the Court will, for purposes of its equal protection analysis, assume the following to be true. In 1861, the Missouri State legislature abolished the local police forces of St. Louis and Kansas City and created in their place metropolitan police departments independent of the city government. The metropolitan police forces were to be operated by boards of police commissioners appointed by the Governor of Missouri. The St. Louis Police Department has been operated by a board of police commissioners appointed by the Governor since 1861.

On March 15, 1932, the Missouri Supreme Court held that the statute under which the Kansas City metropolitan police department was created and operated constituted an unconstitutional delegation of legislative power to an administrative agency. This decision had the immediate effect of placing the Kansas City Police Department under the control of the city government.

Between March 15, 1932 and July 8, 1939, the power to control the Kansas City Police Department was vested in local Kansas City authorities. During this time, the defendants argue, employment on the force and advancement within the department became subject to a political patronage system operated by Thomas J. Pendergast, the leader of the party in power at that time. The defendants maintain that the Pendergast regime, upon taking control of the Kansas City Police Department, terminated the employment of those officers who had not demonstrated their loyalty to Pendergast's Democratic party machine. The Kansas City Police Department at that time, according to the defendants, was operating under a system of political patronage, and police officers were forced to make political contributions to Pendergast's organization in order to keep their positions in the department. In addition, the defendants contend that promotion within the department depended not on performance or merit, but on the influence of the appropriate politician.

The defendants argue that as a result of these circumstances, corruption in the Kansas City Police Department was rampant, organized crime proliferated throughout the area without effective police interference, and a variety of forms of election fraud flourished with the assistance and protection of local police officers. During this same period however, the St. Louis Police Department earned

a reputation as one of the two most effective police departments in the country.

On July 8, 1939, the Missouri State legislature enacted a statute applicable only to Kansas City, by which control of police departments in all cities of the State having a population between 200,000 and 500,000 inhabitants was placed in the hands of a board consisting of the mayor and four commissioners appointed by the Governor. This statute required all members of the police force to refrain from participating in any partisan political activity. *See* R.S. Mo. § 7645 (1939). That statute was amended in 1943 and is now codified as Mo.Rev.Stat. § 84.830. This law was enacted, according to the defendants, for the specific purpose of eliminating political influence in the Kansas City police department, and no similar state legislation was passed concerning other metropolitan areas of Missouri because such remedial action was not necessary at that time.

II. *Equal Protection Analysis*

The issue to be decided is whether a Missouri statute prohibiting political contributions by Kansas City police officers violates the plaintiff's constitutional right to equal protection of the law because the statute applies only to officers of the Kansas City Police Department without restricting the rights of officers in other metropolitan areas. The Board of Police Commissioners argues that the statute should be upheld because the state is entitled to wide discretion in determining whether its laws shall operate statewide or only in certain areas of the state, and in determining which of its employment positions should be regulated. The Board also suggests that the Equal Protection Clause is not violated by Mo.Rev.Stat. § 84.830 because the Clause

does not require territorial uniformity. The Board suggests that the history of corruption in the Kansas City Police Department establishes the unique need of Kansas City to be free from even the appearance of political influence. Moreover, the Board argues that the challenged statute should not be subject to strict judicial scrutiny because no fundamental constitutional right is involved.

The Fourteenth Amendment of the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause directs that all persons similarly situated shall be treated alike. *Plyler v. Doe,* 102 S.Ct. 2382, 2394 (1982).

"The framework for evaluating constitutional challenges to statutory or regulatory classifications is well established. The first determination is the appropriate test to be employed." *Costner v. United States,* 720 F.2d 539, 541 (8th Cir. 1983). Where the classification "does not impermissibly interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the strict scrutiny test does not apply." *Id.* "Instead, the classification is to be examined under the rational basis test and the regulation must be upheld if it is rationally related to furthering a legitimate state purpose." *Id. See generally,* Note, Rethinking Equal Protection, 49 Mo.L.Rev. 166 (1984).

Under the rational basis analysis of equal protection issues, legislative classifications are valid unless they bear no rational relationship to the state's objectives. *Massachusetts Board of Retirement v. Murgia,* 96 S.Ct. 2562, 2567 (1976). Under this approach, state legislation does not violate the Equal Protection Clause merely because the classifications are imperfect. *Dandridge v. Wil-*

liams, 90 S.Ct. 1153, 1161 (1970). Under rational basis analysis, even if the classification involved is to some extent both under-inclusive and over-inclusive, perfection in drawing the line is not required. *Vance v. Bradley,* 99 S.Ct. 939, 948 (1979). Under rational basis analysis, the burden is on those challenging the legislation to convince the Court that "the legislative facts on which the legislation is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id.* at 949.

In its prior decision in this case, the Eighth Circuit recognized that the classification created by Mo.Rev.Stat. § 84.830 may require more than a rational basis because it affects First Amendment rights. *Reeder,* 733 F.2d at 549. The plaintiff argues that the relaxed rational basis standard should not be applied in this case because First Amendment rights are at stake. "When legislative action affects individual interest of [a significant] dimension, a heightened level of judicial scrutiny is appropriate." *Vance v. Bradley,* 99 S.Ct. at 951. (Marshall, J. dissenting). The use of strict judicial scrutiny under equal protection analysis is reserved for cases involving laws which operate to the disadvantage of suspect classes or which interfere with the exercise of fundamental rights and liberties explicitly or implicitly recognized by the Constitution. *San Antonio Independent School District v. Rodriguez,* 93 S.Ct. 1278, 1288-1289 (1973). "In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein." *Plyler,* 102 S.Ct. at 2395 n. 15. The Supreme Court has noted that "contributing to an organization for the purpose of spreading a political

message is protected by the First Amendment." *Abood v. Detroit Board of Education,* 97 S.Ct. 1782, 1799 (1977), citing *Buckley v. Valeo,* 96 S.Ct. 612 (1976). In *Buckley,* the Supreme Court stated that "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Buckley,* 96 S.Ct. at 636. Accordingly, the use of strict scrutiny is mandated in evaluating Mo. Rev.Stat. § 84.830 because that statute limits the exercise of a fundamental First Amendment right.[2]

Where strict scrutiny is invoked because government regulation limits fundamental rights derived from the First Amendment, "the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown,* 100 S.Ct. 2286, 2291 (1980). Where a state statute limits a fundamental right, "the statutory classi-

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2. Similarly, in *Federal Election Commission v. National Conservative Political Action Committee,* ..... S.Ct. ..... (1985), the Supreme Court examined a provision of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9012(f), which makes it a criminal offense for an independent political committee to expend more than $1,000 to further the election of a Presidential candidate who has elected public financing under the Act. The Supreme Court held the provision unconstitutional on its face because it violated First Amendment freedoms of speech and association. The Court noted that there "can be no doubt that the expenditures in this case produce speech at the core of the First Amendment." *Federal Election Commission,* ..... S.Ct. at ..... The Court observed that such "expenditures are entitled to full First Amendment protection," ..... S.Ct. at ....., and that "when the First Amendment is involved, our standard of review is 'rigorous,' *Buckley v. Valeo,* 424 U.S. at 29, and the effort to link either corruption or the appearance of corruption to PACs, whether large or small, simply does not pass this standard of review. . . . We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restrictions of clearly protected conduct." ..... S.Ct. at .....

fication would have to be not merely *rationally related* to a valid purpose, but *necessary* to the achievement of a *compelling* state interest." *Eisenstadt v. Baird,* 92 S.Ct. 1029, 1035 n. 7 (1972) (emphasis original). Where classifications impinge upon the exercise of fundamental rights, the strict scrutiny analysis requires the state to demonstrate "that its classification has been precisely tailored to serve a compelling state interest." *Plyler v. Doe,* 102 S.Ct. at 2395.

The Board of Police Commissioners argues that a state "has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature 'having in mind the needs and desires of each.' " *Griffin v. County School Board of Prince Edward County,* 84 S.Ct. 1226, 1233 (1964), quoting *Salsburg v. Maryland,* 74 S.Ct. 280, 284 (1954). Generally a state legislature must have "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns, both public and private, and that account for limitations on the practical ability of the state to remedy every ill." *Plyler v. Doe,* 102 S.Ct. at 2394. *See also Broadrick v. Oklahoma,* 93 S.Ct. 2908, 2913 n. 5 (1973) (state legislature "must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated.") The Supreme Court has also stated, however, that deference to state legislatures does not mean that courts should blindly approve state regulation, particularly where substantial constitutional interests are involved. In *Plyler,* the Supreme Court stated that "we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard

to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional promises." *Plyler*, 102 S.Ct. at 2394. Where fundamental constitutional rights are limited, the classification is not entitled to deference, but rather the burden is on the state to demonstrate that the regulation satisfies the strict scrutiny standard. *Id.* at 2395. As noted previously, the classification in the instant case limits a fundamental First Amendment right, the right to contribute to a political campaign or political organization. Therefore, the classification is not entitled to deference, and the burden is on the Board of Police Commissioners to show that the regulation is necessary to a compelling state interest under strict scrutiny analysis.

Section 84.830 may satisfy strict scrutiny under the Equal Protection Clause in either of two ways. First, the regulation is constitutional if the state has a particular compelling interest in eliminating political influence in the Kansas City Police Department only, with no similar interest in the police departments in other municipalities in the state. Alternatively, the regulation is valid if, given that the state has a compelling interest regarding the elimination of political influence in police departments in general,[3] the regulation is ncessary to the fulfillment of that interest.

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3. *See Pollard v. Board of Police Commissioners*, 665 S.W.2d 333, 342 (Mo. 1984) (en banc). In *Pollard*, the Missouri Supreme Court subjected the provisions of § 84.830 to analysis under the First Amendment and concluded that "the interest of a state in protecting a metropolitan police department from political domination and influence is substantial, significant, important and compelling." *Id.* The *Pollard* court's First Amendment analysis was adopted by the Eighth Circuit in *Reeder*. *See* 733 F.2d at 545. The Missouri Supreme Court rejected the equal protection

(Continued on following page)

Although the Board of Police Commissioners argues that there is a particular state interest in regulating the Kansas City Police Department more closely than other metropolitan police departments, the only evidence presented in support of that contention was the historical background describing the influence of the Pendergast political machine. Although the plaintiff does not challenge the Board's assertion that political patronage and corruption were rampant in the Kansas City Police Department in the 1930s, no evidence was presented establishing that the Kansas City Police Department is presently affected by political influence, or that the Kansas City Police Department has been subject to political domination since 1940. Similarly, no evidence was presented suggesting that there presently is less necessity for regulating other metropolitan police departments. "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." *Chastleton Corp. v. Sinclair,* 44 S.Ct. 405, 406 (1924). "Courts have always been, and should be, reluctant to impose broad statutory rules that result in purposeless and unnecessary harshness. When the reason of the law ceases, the law itself ceases (to operate),

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Footnote continued—

challenge to § 84.830 based on *Otten v. Schicker,* 655 F.2d 142, 146 (8th Cir. 1981) (city police department regulation prohibiting employees of department from running for elective office did not violate equal protection on ground that rule applied only to employees of police department and not to other public officials). The Eighth Circuit in *Reeder,* however, refused to adopt the Missouri Supreme Court's equal protection analysis in *Pollard* because the classification in *Otten* "is easier to draw and to justify than a distinction between police officers in one city and police officers in another. In addition, this kind of classification, affecting as it does First Amendment rights, may require more than a rational basis to withstand constitutional attack." *Reeder,* 733 F.2d at 549.

is a well-known and time-proved rule of construction that is appropriate in this case." *Pettyes v. Butler,* 367 F.2d 528, 536 (8th Cir. 1966). *Compare Kormatsu v. United States,* 65 S.Ct. 193 (1944) (domestic detention of Japanese persons in World War II upheld, however, race-based restrictions limiting civil rights are subject to strict scrutiny and justified in this case only by "pressing public necessity"). The Court is not precluded from "pursuing an equitable and historic role by examining the facts of each case in the light of the stated goals to determine on an *ad hoc* basis whether the purposes [of the statute in question] are in any way being served by an application of the literal provisions." *Pettyes,* 367 F.2d at 536. As noted previously, under the strict scrutiny approach to equal protection analysis, the burden is on the Board to establish the existence of a compelling state interest. *See Plyler,* 102 S.Ct. at 2395. No evidence was presented tending to suggest that the State of Missouri has, at the present time, a more significant interest in regulating the Kansas City Police Department than other metropolitan police departments throughout the state. Accordingly, the Court concludes that no particular state interest currently exists concerning regulation of the Kansas City Police Department as compared to other departments, therefore, the Board has failed to meet its burden of proof with respect to that contention.

In the alternative, § 84.830 may survive under strict scrutiny analysis if the classification is necessary to the achievement of the state's general interest in protecting metropolitan police departments from political influence.

Although the Eighth Circuit's decision in *Reeder* makes it clear that a state may generally prohibit police officers from making political contributions without vio-

lating First Amendment guarantees, the unresolved question is whether the state can impose such a limitation on the members of the Kansas City Police Department without imposing the same restriction on other municipal police departments.

An under-inclusive classification contains all similarly situated people but excludes others who are similar to them in terms of the purpose of the law. *Barnhorst v. Missouri State High School Activities Ass'n,* 504 F. Supp. 449, 459 (W.D. Mo. 1980). *See generally* J. Novak, R. Rotunda & J. Young, *Handbook of Constitutional Law* 588-89 (2nd ed. 1983). "It is sometimes said that under-inclusive burdens are not viewed as strictly by the Court because those burdened by the classification are properly identified as deserving the burden or regulation and that the legislature may seek to solve social problems 'one step at a time.' " *Id.* at 589. However, if "under-inclusive classifications are usually upheld it is because they tend to appear in general as 'economic' or 'social welfare' regulations where the Court does not require the legislature to demonstrate a very close relationship between its classification and the purposes of the statute." J. Nowak, R. Rotunda & J. Young, *supra* at 589. "Thus a key factor becomes the standard under which the [courts] will review the permissibility of the government ends and the degree of relationship between the classification and these ends." *Id.*

By comparison, a "law may be said to be over-inclusive when the legislative classification includes all persons who are similarly situated in terms of the law plus an additional group of persons." *Id.* Over-inclusiveness occurs when a classification "treats in a similar manner not only those persons whose characteristics similarly relate to

the purpose of the law but also some additional persons who do not share the legitimately distinguishing characteristics." *Id.* at 588. Where government action is claimed to violate First Amendment guarantees, a finding of over-inclusiveness is both significant and crucial. *See Dandridge v. Williams,* 90 S.Ct. 1153, 1161 (1970). "For when otherwise valid governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional." *Id.*

In the instant case, § 84.830 is subject to challenge under the Equal Protection Clause as under-inclusive in that its proscription includes all similarly situated people within the Kansas City Police Department, but excludes others who are similar to them in terms of the purpose of the statute. Generally, a finding of under-inclusiveness is not fatal in an equal protection challenge. The Supreme Court has "frequently upheld under-inclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it." *Erznoznik v. City of Jacksonville,* 95 S.Ct. 2268, 2275 (1975). The Supreme Court has also noted, however, that under-inclusiveness is a more serious flaw where First Amendment rights are limited. In *Erznoznik,* the Court rejected a claim that a city ordinance prohibiting the showing of films containing nudity by drive-in theaters was valid as a traffic ordinance designed to prevent traffic accidents caused by distraction of passing motorists. The Court noted that the statute was "strikingly underinclusive" because there was "no reason to think that a variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist." 95 S.Ct. at 2275.

In concluding that the ordinance was fatally under-inclusive, the Supreme Court stated that the presumption of statutory validity of under-inclusive legislation

> has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." (cite omitted) Thus, "under the Equal Protection Clause, not to mention the First Amendment itself," (cite omitted) even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions.

Erznoznik, 95 S.Ct. at 2275-76.

Likewise, under-inclusiveness must be carefully scrutinized when the challenged regulation deprives individuals of an isolated group of their fundamental First Amendment rights without limiting others similarly situated. Given that the state has a compelling state-wide interest in protecting metropolitan police departments from political influence and corruption, it is difficult to comprehend how a state law limiting political contribution by Kansas City police officers only can be necessary or even substantially related to the achievement of that interest. Rather, it is evident that such a goal could be realized only through legislation applicable to all metropolitan police departments in the state. Strict scrutiny analysis requires that the defendants demonstrate that the challenged classification is necessary, that is, finely and precisely tailored to serve the compelling state interest. *See Plyler,* 102 S.Ct. at 2395; *Carey,* 100 S.Ct. at 2291; and *Eisenstadt,* 92 S.Ct. at 1035 n. 7. The defendants have failed to meet this burden and, therefore,

the Court concludes that the provision of Mo.Rev.Stat. §84.830 prohibiting political contributions by members of the Kansas City Police Department is unconstitutional in that its under-inclusiveness violates the Equal Protection Clause of the Fourteenth Amendment. Accordingly, it is hereby

ORDERED that the defendants and their agents, employees, successors in office and all persons acting in concert or participation with them, are permanently enjoined from taking any steps to enforce the provisions of Mo. Rev.Stat. § 84.830 in connection with the plaintiff's political contribution of $500 in June of 1982. It is further

ORDERED that the defendants shall bear the costs of this proceeding.

/s/ Scott O. Wright
Scott O. Wright
United States District Judge

June 2, 1985.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1893

Mark Reeder,
Appellee,

v.

Kansas City Board of Police Commissioners; Larry L. Joiner; Arthur D. Brookfield, III; John L. Williams; Beverly Parks Barker; Richard L. Berkeley, and William Birt,
Appellants.

On Appeal from the United States District Court for the Western District of Missouri.

Submitted: April 14, 1986
Filed: July 21, 1986

Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

This case is a challenge, under the Equal Protection Clause of the Fourteenth Amendment, to a Missouri statute which prohibits members of the Kansas City Police Force from participating in or contributing money to political causes and campaigns. No such drastic prohibition on political activity applies to police in other Missouri

cities. In an earlier appeal to this Court, *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543 (8th Cir. 1984), we rejected arguments that this statute violated the First Amendment and that it attempted to regulate in a field preempted by the 1974 amendments to the Federal Election Campaign Act. We remanded to the District Court for more complete development of the equal protection issue. That Court held that since the statute restricted a fundamental right it must be subjected to strict scrutiny. The trial court then determined that, because the statute was deliberately underinclusive, and the state had not established a compelling reason for the geographical discrimination, the statute violated the Equal Protection Clause. We reverse, finding that under the precedents of the Supreme Court a statute which discriminates between the political subdivisions of a state does not offend the Equal Protection Clause. That clause protects people, not places. So long as the statute treats the same all persons who are similarly situated, i.e., those who are within its jurisdictional reach, regardless of the fact that other statutes apply to other parts of the state, there is no ground for a challenge under the Equal Protection Clause. We therefore need not analyze the statute under the strict scrutiny standard which would otherwise apply when a regulation touches the exercise of fundamental rights. Indeed, under the controlling precedents, this kind of geographical distinction is simply not subject to traditional equal-protection analysis.

I.

Plaintiff Mark Reeder has been employed by the Kansas City Police Department since 1972, at first as a patrolman, and since 1980 as a sergeant. In the summer of 1982, he made a $500 contribution to the campaign of a candidate

for the United States Congress. In doing so, he ran afoul of R.S. Mo. §84.830. The statute is part of a comprehensive regulatory scheme directed exclusively towards the Kansas City Police Department.[1] It forbids employees and officers of the department to engage in almost any kind of political behavior other than voting.[2] Contributions

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1. Although the statutes are compiled under a grouping entitled "Provisions Applicable to Kansas City" the actual language of these statutes makes no reference to Kansas City by name. See R.S. Mo. §§84.350-.860. Instead, the police provisions are made applicable to cities "that now have, or may hereafter have, three hundred thousand inhabitants and not over seven hundred thousand inhabitants." §84.350. This locution was apparently necessary in order to avoid violating the provision of the Missouri Constitution prohibiting local or special laws. See Missouri Constitution art. 3, §40. The Missouri Supreme Court has approved classification of cities or counties by population, even though only one such city exists, so long as other cities could conceivably come within the range of the statute. See, *e.g., Collector of Revenue v. Parcels of Land Encumbered With Tax Delinquent Liens Serial Numbers 1-047 and 1-048*, 517 S.W.2d 49 (Mo. 1974).

Nevertheless, we do not doubt that this law was always intended to apply to Kansas City alone, despite the seemingly general language. When first drafted, it was made applicable to cities between 300,000 and 500,000 in population, of which Kansas City was the only one. A separate and similarly comprehensive law applied to cities of over 500,000 population, of which St. Louis was the only one. In 1958, when the population of Kansas City was close to the upper limit of its class, the law was amended to raise the upper limit to 700,000, and the "St. Louis" police law was similarly amended to apply only to cities of over 700,000 population. When, in 1971, the census showed St. Louis with a population of less than 700,000, the legislature prevented that city from falling within the same class as Kansas City by enacting legislation providing that once a "city not located in a county" (St. Louis is the only one) comes under the operation of a law based on its population, a subsequent loss of population does not affect its status. See *State ex rel. McNeal v. Roach*, 520 S.W.2d 69, 74-75 (Mo. 1975).

2. The statute includes the following:

1. No person shall solicit orally, or by letter or otherwise, or shall be in any manner concerned in soliciting, any assessment, contribution, or payment for any political purpose whatsoever from any officer or employee in the service of

(Continued on following page)

to candidates or parties are expressly forbidden. The penalty for violation of this provision is summary discharge from employment. The statute also bars violators from reemployment with the department for a period of five years and provides for criminal penalties for willful or culpably negligent violation.

No other police departments in Missouri are subject to similar political restrictions. While the St. Louis department is governed by a comprehensive legislative scheme and operates under the direction of a Board of Commissioners appointed by the Governor, as does the Kansas City department (both departments are actually creatures of the state government, wholly independent of the cities which they serve), the St. Louis provisions in the statutes do not include a political-activity ban. (Rules of the St. Louis department do restrict such activities sub-

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Footnote continued—

> the police department for such cities or from the members of the said police board. No officer, agent, or employee of the police department of such cities shall permit any such solicitation in any building or room occupied for the discharge of the official duties of the said department. No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatsoever.
>
> 2. . . . No officer or employee of such department shall be a member or official of any committee of any political party, or be a ward committee man or committee woman, nor shall any such officer or employee solicit any person to vote for or against any candidate for public office, or "poll precincts" or be connected with other political work of similar nature on behalf of any political organization, party, or candidate. All such persons shall, however, retain the right to vote as they may choose and to express their opinions on all political subjects and candidates.
>
> 3. . . .

R.S. Mo. §84.830.

stantially, but they are not so strict as the Kansas City statute, and they do not forbid contributions.) Similarly, the statutes governing police forces in first-class cities (which were repealed in 1983, see R.S. Mo. §§85.010-.290 (1969)), while vesting control of such forces in a board appointed by the Governor, did not regulate political activity of police personnel. The uniquely strict aspects of the Kansas City police statute derive from efforts to curb serious political corruption of the police department in earlier times when the department was under local control.

II.

Mr. Reeder does not dispute that the state has an interest in preventing political corruption of police forces, the apparent purpose of this statute. His argument, with which he District Court substantially agreed, is simply this: when the state sets out to regulate the private political conduct of a public employee, that conduct enjoys to some degree the protection of the First Amendment, and the state must regulate with an even hand. If the state chooses to restrict the political expression of persons in one locality but not in another, then it is not, according to this view, treating similarly those who are similarly situated. In order to regulate in such an uneven way, the state must show compelling justification.

The problem with Mr. Reeder's argument is that the Supreme Court has long held that when the state chooses to regulate differentially, with the laws falling unequally on different geographic areas of the state, the Equal Proetction Clause is not violated so long as there is no underlying discrimination against particular persons or groups. The Equal Protection Clause protects people, not places. *McGowan v. Maryland*, 366 U.S. 420, 427 (1961).

So long as all persons within the jurisdictional reach of the statute are equally affected by the law, it matters not that those outside the territorial reach of the law are free to behave differently.

The earliest expression of this principle was in *Missouri v. Lewis*, 101 U.S. 22 (1879). There, the appellant complained of the State of Missouri's dual system of appellate courts, whereby litigants in St. Louis and surrounding counties were limited to an appeal to the St. Louis Court of Appeals in certain classes of cases, while citizens in other areas of the state had an appeal of right to the Missouri Supreme Court. The Supreme Court held that there was no offense to the Equal Protection Clause if the state chose to establish different systems of justice for different parts of the state. "[The Clause] contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made." *Id.* at 30. The Court noted that in that case there was no allegation that the statute "might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district." *Id.* at 32. The Court suggested that if that were the case, then the Equal Protection Clause would be implicated, not by the territorial distinction, but by the underlying race or class distinction.

Similarly, in *Hayes v. Missouri*, 120 U.S. 68 (1887), the Supreme Court upheld a Missouri statute which allowed prosecutors in capital cases to exercise fifteen peremptory challenges in cities of over 100,000 population, but to have only eight challenges in smaller towns. The

Court noted that the state had a reasonable basis for the distinction and that in any event the law treated alike persons who were situated alike. *Id.* at 72. And in *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U.S. 474 (1899), the Court approved a Maryland statute which authorized trial by jury in all areas of the state except in the City of Baltimore.

But these are old cases. It could be argued that the principle which they express has become vitiated through disuse if there had been no subsequent cases on the point. However, the Court again faced the question of geographic discrimination in *Salsburg v. Maryland*, 346 U.S. 545 (1954). In *Salsburg*, a statute allowed the admission of illegally seized evidence in misdemeanor prosecutions in some counties but required its exclusion in others. The Court reiterated the *Lewis* rule that territorial discrimination alone does not violate the Equal Protection Clause, and added a further rationale for the rule. It said that the state could just as easily have granted home rule to each county and left it to the counties to decide on their separate rules of evidence, and that for the state legislature to enact local legislation, having in mind the needs and desires of the localities, was a matter of discretion for the lawmakers. *Id.* at 552-53.

Salsburg was an illegal-search case decided in the years before the Fourth Amendment exclusionary rule was extended to state prosecutions. See *Mapp v. Ohio*, 367 U.S. 643 (1961). There was no underlying federally enforceable right in that case. (The same may be said of the older Supreme Court cases just discussed.) The only ground for challenge was unequal application of state laws. In the present dispute, there is an under-

lying federal right, i.e., the right to participate in politics. That right is a fundamental one, see *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), though, as we have already held in this case, it is not absolute. Sgt. Reeder suggests that where a fundamental right is involved, the Supreme Court would not follow the precedents of *Lewis* and *Salsburg*. However, this argument must contend with *McGowan v. Maryland*, 366 U.S. 420 (1961). That case involved a challenge to a Sunday-closing statute which exempted certain counties from its provisions, thereby laying a heavier burden on the citizens of the counties not exempted. The Court recognized that a federally protected right was involved and subjected the statute to "the close scrutiny demanded of us when First Amendment liberties are at issue. . . .", *id.* at 449, in rejecting an Establishment Clause challenge. As to the geographic discrimination issue, though, the Court relied on *Salsburg*, subjecting the statute to, at the most, rational-basis scrutiny. *Id.* at 426-27.

The Supreme Court in 1964 again dealt with a state regulatory scheme which bore more heavily on persons in one locality than on those elsewhere. In *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964), the State of Virginia, for the purpose of assisting localities in resisting racial integration of the public schools, had enacted legislation which, in effect, provided for integrated public schools in every county but one, Prince Edward County. There, private schools were open to white children; these schools were supported by state and local tuition grants; there were no schools in the county, public or private, which were open to black children. The Court noted that a state has wide discretion to decide which laws shall operate statewide and which shall be local; this is a matter for legislative discretion.

However, the Court held, "[w]hatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." *Id.* at 231. In other words, the state's choice to enact local laws must not mask invidious discrimination against a distinct minority group. In *Griffin,* the state's conduct violated the Constitution not because it was local legislation, but because it discriminated impermissibly between races. Had Virginia chosen to close public schools statewide and to substitute a system of white private schools supported through the channeling of public money, as was done in Prince Edward County, its action would have been just as illegal despite the fact that it applied across the board.

More recently, the Court has upheld a Kentucky statute which provided for law-trained judges in misdemeanor cases in the larger municipalities, but allowed for lay judges in the smaller towns. *North v. Russell,* 427 U.S. 328 (1976). The Court concluded that since there was no constitutional flaw in the system generally (the statute allowed for trial de novo before a lawyer-judge in all instances), and since persons in each locality were treated the same, it did not matter that persons in other localities were treated differently. *Id.* at 338-39.

In all these cases, there is no suggestion that the Supreme Court has wavered from its long-standing view that reasonable territorial distinctions are within the discretion of the legislature. When the enactment in question affects the exercise of a fundamental right, then it must withstand rigorous scrutiny regardless of whether the act has local or general effect. Once the state has demonstrated, as in *McGowan* and here, that the law serves a

compelling public need, and that it does not single out members of a protected class, then it is within the reasonable discretion of the lawmaking body whether to give the law its maximum territorial effect or to restrict its operation to the locality thought to be most in need of it.

In our previous opinion in this case, we held that Missouri could choose to restrict the political activities of certain of its public employees. *Reeder v. Kansas City Board of Police Commissioners,* 733 F.2d 543 (1984). See generally *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). We now hold that if the state is justified in applying such restrictions generally and making them effective, as it could, against all police personnel within the state, then it may choose instead to limit the effect of this law to the locality where it is determined to be most needed. The Supreme Court of Missouri has reached the same conclusion. *Pollard v. Board of Police Comm'rs,* 665 S.W. 2d 333 (Mo. 1984), *cert. denied,* 105 S. Ct. 3534 (1985). The distinction thus drawn, though vulnerable, is not irrational. It is supported by the history of Kansas City, as well as by a strong local policy, contained in the City Charter, against political activity by public employees. Kansas City, Mo., Charter §126. This Charter provision does not apply of its own force to the police, which are governed by a board appointed by the Governor, as we have noted, but its existence is strong evidence of the needs and desires of that locality, a factor specifically mentioned by the Supreme Court in *Salsburg.*

We deem it appropriate to add that this is one of many cases that demonstrate graphically the limitations of constitutional litigation. If it were our task to judge the wisdom or fairness of this law, we might well come to a different conclusion. That is not our task. In general,

wisdom, fairness, and policy of statutes are the business of the legislature, not the courts. Our business is the important but narrow job of comparing what the political branches of government have done with the fundamental law, and upholding the former if there is no conflict. Here, we believe the question is concluded by controlling precedents of the Supreme Court.

Reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION

Amendment XIV

Section 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATUTES

R.S.MO. 84.830 (1978). POLICE DEPARTMENT—PROHIBITED ACTIVITIES—PENALTIES (KANSAS CITY)

1. No person shall solicit orally, or by letter or otherwise, or shall be in any manner concerned in soliciting, any assessment, contribution, or payment for any political purpose whatsoever from any officer or employee in the service of the police department for such cities or from members of the said police board. No officer, agent, or employee of the police department of such cities shall permit any such solicitation in any building or room occupied for the discharge of the official duties of the said department. No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever.

2. No officer or employee of said department shall promote, remove, or reduce any other official or employee, or promise or threaten to do so, for withholding or refusing to make any contribution for any political party or purpose or club, or for refusal to render any political service, and shall not directly or indirectly attempt to coerce, command, or advise any other officer or employee to make any such contribution or render any such service. No officer or employee in the service of said department or member of the police board shall use his official authority or influence for the purpose of interfering with any election or any nomination for office, or affecting the result thereof. No officer or employee of such department shall be a member or officials of any committee of any political party, or be a ward committee man or committee woman, nor shall any such officer or employee solicit any person to vote for or against any candidate for public office, or "poll precincts" or be connected with other political work of similar character on behalf of any political organization, party, or candidate. All such persons shall, however, retain the right to vote as they may choose and to express their opinions on all political subjects and candidates.

3. No question in any examination shall relate to political or religious opinions or affiliations, and no appointment, transfer, layoff, promotion, reduction, suspension, or removal shall be affected by such opinions or affiliations.

4. No person shall make false statements, certification, mark, rating, or report with regard to any tests, certificate, or appointment made under any provision of sections 84.350 and 84.860 or in any manner commit or attempt to commit any fraud preventing the impartial execution of this section or any provision thereof.

5. No person shall, directly, or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion to, or any advancement in, a position in the service of the police departments of such cities.

6. No person shall defeat, deceive, or obstruct any person in his right to examination, eligibility, certification, appointment or promotion under sections 84.350 to 84.860, or furnish to any person any such secret information for the purpose of affecting the right or prospects of any person with respect to employment in the police departments of such cities.

7. Any officer or any employee of the police department of such cities who shall be found by the board to have violated any of the provisions of this section shall be discharged forthwith from said service. It shall be the duty of the chief of police to prefer charges against any such offending person at once. Any member of the board or of the common council of such cities may bring suit to restrain payment of compensation to any such offending officer or employee and, as an additional remedy, any such member of the board or of the common council of such cities may also apply to the circuit court for a writ of mandamus to compel the dismissal of such offending officer or employee. Officers or employees discharged by such mandamus shall have no right of review before the police board. Any person dismissed or convicted under this section shall, for a period of five years, be ineligible for appointment to any position in the service of the police department of such cities or the municipal government of such cities. Any persons who shall willfully or through culpable negligence violate any of the

provisions of this section may, upon conviction thereof, be punished by a fine of not less than fifty dollars and not exceeding five hundred dollars, or by imprisonment for a time not exceeding six months, or by both such fine and imprisonment.

(2)

Supreme Court, U.S.
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No. 86-858

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARK REEDER,
Petitioner,

vs.

KANSAS CITY BOARD OF POLICE COMMISSIONERS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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22pp

QUESTION PRESENTED FOR REVIEW

DID THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY RULE THAT THE MISSOURI STATE LEGISLATURE MAY LIMIT TO A CERTAIN POLITICAL SUBDIVISION OF THE STATE THE APPLICATION OF RESTRICTIONS ON POLITICAL ACTIVITIES OF POLICE OFFICERS AND EMPLOYEES, WITHOUT DEPRIVING PETITIONER OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

The opinion petitioner seeks to have reviewed herein is reported at 796 F.2d 1050 (8th Cir. 1986). In addition, the Supreme Court of Missouri has rendered an opinion deciding an issue identical to that raised by petitioner. *Pollard v. Board of Police Commissioners,* 665 S.W.2d 333 (Mo. 1984). On July 1, 1985, this Court denied a Petition for Writ of Certiorari that sought review of that decision. *Pollard v. Board of Police Commissioners,* ..... U.S. ....., 87 L.Ed.2d 657 (1985).

STATEMENT OF THE CASE

The Missouri State Legislature exercises jurisdiction over the police departments of its two largest cities, St. Louis and Kansas City, through separate state statutes that create gubernatorially appointed boards of commis-

sioners to administer the operations of each. *See* Mo. Rev. Stat. § 84.010, *et seq.;* Mo. Rev. Stat. § 84.350, *et seq.* The two boards have a common historical origin. Both were created in 1861 under similar enactments. 1861 Mo. Laws Reg. Sess. 446-53; 1861 Mo. Laws Spec. Sess. 63-67. However, in 1932 the historical paths of the two departments diverged, when the Supreme Court of Missouri held that the statute applicable to Kansas City constituted an unconstitutional delegation of legislative power to an administrative agency. *State ex rel. Field v. Smith,* 329 Mo. 1019, 49 S.W.2d 74 (1932) (en banc). As a result, the Kansas City Police Department was returned to home rule, while the St. Louis department remained under state control. The events that occurred between 1932 and 1939, when the legislation that is the subject of this litigation was enacted, permanently distinguished the police departments of the two cities from one another.

Local control of the Kansas City Police Department between 1932 and 1939 was the key to the development and prosperity of the political machine of Thomas J. Pendergast. During that period, the politically controlled police force permitted, protected, and participated in vote fraud, ballot stuffing, ghost voting, and voter intimidation to such an extent that the machine was able to determine the outcome of elections not only within Kansas City, but throughout the entire state. App. 172, 260, 272, 275, 276-78, 323, 342-43, 345. The machine maintained its lock on the Kansas City police department through the operation of a patronage system which controlled employment on the force and advancement within the ranks. App. 40, 132, 179-89, 259, 343-44. Police recruits gained employment by pledging allegiance to the machine and were bonded to the politicians through a system of forced contributions.

App. 40, 134-35, 337. The restriction on political contributions of which petitioner complains was passed in direct response to the evils generated by that system. App. 339-350.

While the Kansas City Police Department was operated under local political control, it gained a wide-spread reputation for selective law enforcement geared solely toward furthering the interests of the politicians in power. The department protected violent criminals at the request of the machine. App. 268, 321. As a result, Kansas City had the highest homicide rate of the 15 largest cities in the United States. App. 306. The department permitted and protected gambling, prostitution, narcotics rings, and other forms of organized crime. App. 36-38, 266-70, 283, 293, 294; 39-40, 61-62, 267, 310-12; 309, 310. As a result, Kansas City gained a reputation as the "widest open town in the USA" where "anything goes". App. 267. But during that same period, the St. Louis Police Department became known as one of the two best in the country. App. 293, 294, 305, 313. Therefore, when the Missouri Legislature considered measures to eliminate political influence in the Kansas City Police Department, and the corruption that flowed from that influence, there was no need to take similar remedial action with respect to St. Louis.

The Kansas City Police Department was returned to state control in 1939. The statute by which that was accomplished required all members of the department to refrain from participation in any "partisan political activity". Mo. Rev. Stat. § 7645 (1939). In 1943, the statute was amended to its current form in response to a referendum under which the people of Kansas City adopted a City Charter that includes a proscription against polit-

ical contributions by city employees. That proscription is identical to the one contained in Mo. Rev. Stat. § 84.830. App. 371, 375 (Kansas City Charter, § 126); 1943 Mo. Law p. 727, § 7681.

Petitioner is a sergeant of the Kansas City Police Department. In July of 1982 he made a $500 public partisan political contribution to the Carnes for Congress Committee, the campaign committee of John Carnes, a candidate for the United States Congress in Missouri's Fifth Congressional District. App. 17-18. He thereby violated Mo. Rev. Stat. § 84.830.1 and is subject to discharge from the force pursuant to Mo. Rev. Stat. § 84.830.7. Below, petitioner raised challenges to the enforcement of those provisions against him under the First Amendment, under the equal protection clause of the Fourteenth Amendment, and under the theory that the statute is preempted by the Federal Election Campaign Act. In two separate opinions, the Eighth Circuit has rejected each of those challenges. However, the Petition for Writ of Certiorari seeks review only of the decision by which the Eighth Circuit ruled that § 84.830 does not deprive petitioner of equal protection. Thus, petitioner has abandoned his First Amendment and preemption claims.

SUMMARY OF ARGUMENT

Petitioner has cited no "special and important reasons" within the purview of Rule 17 of the rules of this Court for granting review of this case by Writ of Certiorari. The Court has previously denied certiorari in a case that included the identical equal protection issue raised by petitioner. Further, Petitioner has set forth no evidence or argument that the decision of the Eighth Circuit rejecting Petitioner's equal protection challenge bears upon any issue

of national significance. Finally, the issues raised by Petitioner's equal protection argument have previously been decided by this Court. The decision of the Eighth Circuit is in complete accord with those prior decisions.

REASONS FOR DENYING THE WRIT

I. THE COURT HAS PREVIOUSLY DENIED A REQUEST TO CONSIDER THE IDENTICAL EQUAL PROTECTION QUESTION PRESENTED BY THE PETITION.

Roger Pollard is also a sergeant of the Kansas City Police Department. Like petitioner, Sgt. Pollard made a public partisan political contribution to the Carnes for Congress Committee in July of 1982. Based upon that contribution, the Board of Police Commissioners commenced disciplinary proceedings against Sgt. Pollard identical to those commenced against Petitioner. Sgt. Pollard filed suit in the Circuit Court of Jackson County, Missouri seeking to enjoin those proceedings. The constitutional issues raised by Sgt. Pollard in state court were identical to those raised by petitioner in federal court.[1]

In March of 1984, the Supreme Court of Missouri upheld § 84.830 against Sgt. Pollard's constitutional challenges. The court's opinion specifically rejected the argument that § 84.830 violates equal protection because the application of its restrictions is limited to Kansas City

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1. On September 30, 1982, the state circuit court conducted an evidentiary hearing on Sgt. Pollard's request for injunctive relief. The *Reeder* case was originally submitted to the federal district court on the basis of the record developed at that hearing, as supplemented by a Stipulation of Fact identifying the parties, establishing jurisdiction, and showing the basic occurrences out of which the controversy had arisen. App. 17-189.

police officers and employees. *Pollard v. Board of Police Commissioners, supra,* 665 S.W.2d at 342. Sgt. Pollard, represented by the same attorneys representing petitioner herein, chose to forego his right to appeal that decision under 28 U.S.C. § 1257(2) and, on June 16, 1984, filed a Petition for Writ of Certiorari. *See* Case No. 83-2076. Sgt. Pollard's Petition included the following question presented for review:

> II. Does R.S. Mo. § 84.830 (1978), Which Only Prohibits Political Contributions by Kansas City Police Officers, Violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution Because Only Kansas City Police Officers are Prohibited from Making Such Contributions While No Police Officers in Other Missouri Cities are Subject to Such a Statutory Prohibition?

On July 1, 1985, the Court entered an Order denying that Petition. *Pollard v. Board of Police Commissioners,* ..... U.S. ....., 87 L.Ed.2d 657 (1985).

Petitioner has cited no evidence that the circumstances under which the *Pollard* Petition was considered have changed since the Court ordered its denial. While the basis of the Eighth Circuit's equal protection decision differs from that of the Supreme Court of Missouri the underlying issue considered in both cases is identical. Therefore, like in the *Pollard* case, there are no "special and important reasons" to warrant the grant of certiorari herein.

II. PETITIONER HAS NOT DEMONSTRATED THAT THE DECISION OF THE COURT OF APPEALS BEARS ON ANY ISSUE OF NATIONAL SIGNIFICANCE.

The circumstances under which the prohibition against political contributions by Kansas City police officers and employees was enacted are unique to the State of Missouri. Missouri is the only state wherein local police departments are currently operated under state control. There exists elsewhere no parallel to the police departments of St. Louis and Kansas City, the former which has consistently maintained an outstanding reputation, the latter whose image has been permanently burdened by its former ties to a corrupt political regime. Therefore, the basis on which Mo. Rev. Stat. § 84.830 was enacted applies only within the State of Missouri. While the decision herein is critical to the maintenance of the image and integrity of the Kansas City Police Department and essential to the preservation of the right of the Missouri State Legislature to prescribe the terms and conditions of governmental employment, petitioner has shown no demonstrable impact the decision might have outside of Missouri's borders. Moreover, petitioner cannot argue that the decision to limit the application of § 84.830 to Kansas City police officers and employees impacts upon any federally protected interest of individuals within the state. *Cf. Clements v. Fashing*, 457 U.S. 957 (1982) (Stevens, J. concurring).

The Eighth Circuit's first opinion herein held that § 84.830 does not violate the First Amendment and is not preempted by the Federal Election Campaign Act. *Reeder v. Board of Police Commissioners*, 733 F.2d 543 (8th Cir. 1984). Petitioner has not sought review of that holding.

Therefore, it is established that, had the prohibition against political contributions at issue been promulgated by the Kansas City Board of Police Commissioners under the authority delegated to it pursuant to Mo. Rev. Stat. § 84.420.2 (1), even the argument asserted by petitioner herein would create no equal protection issue. The question presented by the Petition for Certiorari can thus be distilled to whether it is a violation of the United States Constitution for a state legislature to enact a regulation which clearly could have been adopted locally under a delegation of authority. The Court has previously answered that question.

In *Salsburg v. Maryland*, 346 U.S. 545 (1954), the defendant had been convicted, with the aid of evidence seized in violation of the Fourth Amendment, of breaking state gambling laws. He claimed to have been denied equal protection because, under state statute, the evidence would have been excluded in counties other than the one in which he was tried. In rejecting that challenge, the Court stated:

> There seems to be no doubt that Maryland could validly grant home rule to each of its 23 counties and to the City of Baltimore to determine this rule of evidence by local option. *It is equally clear, although less usual, that a state legislature may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each.* Territorial uniformity is not a constitutional requisite.

Id. at 552 (emphasis supplied). This holding establishes that the procedural issue of which state legislative body promulgates an otherwise valid local regulation implicates no federally protected interest under the equal protection clause of the Fourteenth Amendment. The "equal protection clause certainly was not intended to require the

States to justify every decision concerning the terms and conditions of state employment according to some federal standard." *Clements v. Fashing, supra* at 975 n.4 (Stevens, J. concurring).

III. IT IS SETTLED BY PRIOR DECISIONS OF THIS COURT THAT THE DETERMINATION OF THE MISSOURI STATE LEGISLATURE TO LIMIT THE APPLICATION OF MO. REV. STAT. § 84.830 TO KANSAS CITY POLICE OFFICERS AND EMPLOYEES DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION.

A. The Territorial Classification Created by Mo. Rev. Stat. § 84.830 Is Not Subject to Review Under the Equal Protection Clause of the Fourteenth Amendment.

This Court has consistently held that "the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite." *McGowan v. Maryland*, 366 U.S. 420, 427 (1961); *Salsburg v. Maryland, supra* at 551-52 (1954). *See also, North v. Russell*, 427 U.S. 328, 338 (1976); *San Antonio School Dist. v. Rodriquez*, 411 U.S. 1, 28 n.66 (1973); *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 231 (1964); *Mallett v. North Carolina*, 181 U.S. 589, 598 (1901); *Chappell Chemical & Fertilizer Co. v. Sulfur Mines Co. of Virginia*, 172 U.S. 474, 475 (1899); *Hayes v. Missouri*, 120 U.S. 68, 71 (1886); *Missouri v. Lewis*, 101 U.S. 22, 29-32 (1880). The only classification created by § 84.830 is between Kansas City and other political subdivisions of the State of Missouri. The statute masks no underlying intent to discriminate against any class of individuals based upon their personal

characteristics or political beliefs. *Compare Griffin v. School Bd. of Prince Edward County, supra* at 231. It is not designed to provide governmental services of different quality to different cities within the state. *Cf. Clements v. Fashing, supra* at 974 (Stevens, J. concurring). And it affects all persons subject to its jurisdiction in an equal manner. Therefore, the classification created by the statute is not subject to scrutiny for a denial of equal protection under the United States Constitution.

Petitioner argues that those cases, in which the Court has rejected equal protection challenges to state statutes that apply to limited geographical areas, do not determine the validity of a statute that implicates fundamental rights. Petition for Writ of Certiorari at 4. But limiting the application of the rule that "territorial uniformity is not a constitutional prerequisite" to cases in which a rational basis standard of review is otherwise appropriate would deprive the rule of any independent constitutional significance. Moreover, the Court has in fact consistently applied the rule in cases that clearly involved fundamental rights.

McGowan v. Maryland, supra involved a challenge under the First Amendment and the equal protection clause of the Fourteenth Amendment to Sunday closing laws enacted by the state and applicable to certain counties within the state. In discussing the establishment clause issues, the Court noted that it had engaged "in the close scrutiny demanded of us when First Amendment liberties are at issue" and analyzed the statute under a least restrictive means test. *Id.* at 449-50.

In *Salsburg v. Maryland, supra*, the Court upheld a statutory scheme which permitted, only in the county in which the defendant was tried, the introduction of evi-

dence seized in contravention of the Fourth Amendment to the United States Constitution. Thus, the classification at issue impinged upon the defendant's rights of privacy and personal security. The Court had not yet held that the invasion of those rights required exclusion of the evidence in a state prosecution. *See Mapp v. Ohio*, 367 U.S. 643 (1961). But the Court had held that the rights invaded "are to be regarded as of the very essence of constitutional liberty; . . . as important and as imperative as are the guarantees of other fundamental rights of the individual citizen." *Gould v. U.S.*, 255 U.S. 298, 304 (1921).

North v. Russell, supra involved the defendant's fundamental right to liberty. Therefore, in analyzing the defendant's due process claim, the Court stated that "once it appears that confinement is an available penalty, the process commands scrutiny." *Id.* at 334.

Finally, in *San Antonio School Dist. v. Rodriquez, supra*, the plaintiffs argued that certain classifications created by Texas' system of subsidizing state financed school districts with local property taxes were subject to strict scrutiny under the equal protection clause, because the system interfered with the "fundamental" right of education. *Id.* at 29. In Part IIB of the majority opinion, the Court rejected the argument that the right of education is "fundamental." However, in Part IIA, the Court analyzed the classifications described by the plaintiff and implied that, had the classifications at issue been no more than territorial in nature, there would have been no need to proceed to the issue of whether education is a fundamental right. The Court stated:

> Appellees, however, have avoided describing the Texas system as one resulting merely in discrimination between districts per se since this Court has never ques-

> tioned the State's power to draw reasonable distinctions between political subdivisions within its borders. *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 230-31 (1964); *McGowan v. Maryland*, 366 U.S. 420, 427 (1961); *Salsburg v. Maryland*, 346 U.S. 545, 552 (1954).

San Antonio School Dist. v. Rodriquez, supra at 28 n.66.

Therefore, petitioner's argument, that the rule followed by the Eighth Circuit does not apply in cases that involve fundamental rights, is without merit.

Petitioner argues further that *Reynolds v. Sims*, 377 U.S. 533 (1964) and other legislative reapportionment cases contradict the holding of the Eighth Circuit. Petition for Writ of Certiorari at 8-10. He acknowledges that "these cases are different factually from the instant case", but asserts that they nonetheless provide a basis on which to invalidate § 84.830. In making that argument, petitioner misstates the holding of *Reynolds*.

The Eighth Circuit held that § 84.830 is not subject to review under the equal protection clause because "all persons within the jurisdictional reach of the statute are equally affected by the law." 796 F.2d at 1053. Petitioner argues that this holding contravenes *Reynolds* because the statute at issue therein "also treated all persons within its jurisdictional reach—all residents of the same legislative district—the same." Petition for Writ of Certiorari at 10. That statement is wrong. The statutes considered in *Reynolds* and in all legislative reapportionment cases applied throughout the state and impacted upon the voting rights of all citizens within the state. In each of those cases where the single statutory scheme was found to have impermissibly diluted the

voting rights of citizens living in certain districts, the statute was struck down precisely because it did not treat equally all persons within its jurisdictional reach. Thus, the *Reynolds* Court stated that "the concept of equal protection has been traditionally viewed as requiring the uniform treatment of *persons standing in the same relation* to the governmental action questioned or challenged." *Reynolds v. Sims, supra* at 565 (emphasis supplied). Petitioner does not stand in the same relation to the proscription of § 84.830 as do police officers employed in other political subdivisions of the State.

Under *McGowan* and the other cases followed by the Eighth Circuit, a regulation that would be constitutional if promulgated locally under a delegation of authority by the state is necessarily valid if enacted directly by the legislature. This doctrine could not apply in the context of the reapportionment cases. It is impossible for a state to grant to its local political subdivisions jurisdiction to decide how many representatives each will send to the state legislature. But a state can allow each of its political subdivisions to decide the proper forum for appeal from cases tried within the locality, *Missouri v. Lewis, supra,* the method of selecting juries in cases tried within the locality, *Hayes v. Missouri, supra,* the extent to which business will be conducted on Sundays within the locality, *McGowan v. Maryland, supra,* whether local judges must be lawyers, *North v. Russell, supra,* and whether police officers employed within the locality will be prohibited from making political contributions. When the state chooses to make those decisions for particular political subdivisions, according to the needs and desires of each, the equal protection clause of the Fourteenth Amendment is not implicated. *Salsburg v. Maryland, supra* at 552.

B. Section 84.830 Is Within the Leeway of the State Legislature to Determine Which of Its Employment Positions Require Restrictions on Partisan Political Activity and Which May Be Left Unregulated.

The Eighth Circuit held that, since the only classification created by § 84.830 is between the Kansas City Police Department and police departments located in other political subdivisions of the State, the statute was not subject to review under the equal protection clause. However, even had the Eighth Circuit undertaken an equal protection analysis, it would have been required to uphold the statute. The decisions of this Court establish that statutes which impose restrictions on the political activity of some, but not all, government employees do not violate the Fourteenth Amendment.

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the court considered an argument that an Oklahoma statute violated the equal protection clause of the Fourteenth Amendment because it restricted the political activities of classified but not unclassified state employees. The court rejected that argument, stating:

> The contention is somewhat odd in the context of appellants' principal claim, which is that [the statute] reaches too far rather than not far enough. In any event, the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. *See McGowan v. Maryland*, 366 U.S. 420 (1961). And a state can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.

Id. at 607 n.5. On the same day that *Broadrick* was decided, the court affirmed the decision of a three-judge district court holding that Utah's proscription against political activity by certain state employees did not violate equal protection. *Elder v. Rampton,* 413 U.S. 902 (1973). Similarly, in *United Public Workers of America v. Mitchell,* 330 U.S. 75 (1946), the court held:

> Whatever differences there may be between administrative employees of the Government and industrial workers in its employ are differences in detail so far as the constitutional power under review is concerned. *Whether there are such differences and what weight to attach to them are all matters of detail for Congress. . . . The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress.* Courts will interfere only when such regulation passes beyond the general existing conception of governmental power.

Id. at 102 (emphasis supplied). Lower federal courts have consistently followed these cases in rejecting equal protection challenges to statutes that restrict the political activity of certain government employees. *Morial v. Judiciary Comm'n of Louisiana,* 565 F.2d 295, 305-06 (5th Cir. 1977); *Perry v. St. Pierre,* 518 F.2d 184, 186 (2d Cir. 1975); *Smith v. U.S. Civil Service Comm'n,* 520 F.2d 731, 735 (1975); *French v. Devine,* 547 F. Supp. 443, 449 (D.D.C. 1982).

Section 84.830 applies only to police officers and police civilian employees. Therefore, the only distinction between petitioner's equal protection argument and that rejected in *Broadrick* and the other cases cited above is that

this case involves restrictions on political contributions while those cases involved restrictions on direct political activity. In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court held that the right to make political contributions is entitled to a lesser degree of protection under the First Amendment than the right to engage in direct political activity. "By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or a political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20. *See also, Federal Election Comm'n v. National Conservative Political Committee,* 470 U.S. ....., 84 L.Ed.2d 455, 470 (1985); *California Medical Ass'n v. Federal Election Comm'n,* 453 U.S. 182, 196 (1981). Therefore, the distinction between this case and *Broadrick* warrants the invocation of a less restrictive standard of review herein and the determination by the Missouri Legislature to limit to Kansas City the application of the restrictions of § 84.830 is *a fortiori* within the leeway that must be granted to the legislature under the standard prescribed by *Broadrick.*

CONCLUSION

The Court has previously denied a Petition for Certiorari raising an issue identical to that presented by this Petition. That question bears on no issues of national significance. The constitutionality of the challenged statute is settled by prior decisions of this Court. Thus, there are no "special and important reasons" for the Court to exercise its discretion to review the decision of the United States Court of Appeals for the Eighth Circuit on writ of certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 86-858

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARK REEDER,
Petitioner,

vs.

KANSAS CITY BOARD OF POLICE COMMISSIONERS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DENIAL OF CERTIORARI IN THE POLLARD CASE DOES NOT FORECLOSE CERTIORARI AT BAR.

Respondents claim that certiorari should be denied at bar because of this Court's earlier denial of certiorari in *Pollard v. Board of Police Commissioners*, ... U.S. ....., 87 L.Ed.2d 657 (1985), a case involving an issue

similar to the one raised by Petitioner herein. Petitioner would submit Respondents misperceive entirely the precedential effect of a denial of certiorari.

It is axiomatic that the denial of a petition for writ of certiorari is wholly without precedential value in other cases. In *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918 (1950), Justice Frankfurter noted that the denial of certiorari may be the result of any number of different reasons:

> A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.

The rule withholding precedential effect from a denial of certiorari is applicable even if the issues presented in the earlier case (where certiorari was denied) are identical to those presented in a later petition (where it is sought anew), *Hopfmann v. Connolly,* 471 U.S. ....., 85 L.Ed.2d 469, 471 (1985).

That rule is especially appropriate at bar. The portion of the opinion of the Missouri Supreme Court in *Pollard v. Board of Police Commissioners,* 665 S.W.2d 333, 342 (1984), considering the equal protection issue consists of one short paragraph. That Court notes that, "[the equal protection] argument was not relied on by the trial court or briefed on appeal." *Ibid.* Not surprisingly, the Missouri Supreme Court summarily denied the equal protection claim.

When Petitioner's cause was decided by the Eighth Circuit the first time, that Court declined to follow the Missouri Supreme Court's disposition of the equal pro-

tection issue, holding that, "the defendants ought to be allowed a chance to offer evidence to justify the seeming disparity between Kansas City and other police departments in the state." *Reeder v. Kansas City Board of Police Commissioners,* 733 F.2d 543, 549 (8th Cir. 1984). For that reason the Eighth Circuit remanded Petitioner's cause to the district court to further develop the equal protection issue.

This Court's denial of certiorari in *Pollard* occurred *after* the first *Reeder* opinion. Inferably, some of the six members of this Court who voted against certiorari in *Pollard* may have been animated by a desire to see the equal protection issue "further illuminated by the lower court", following the remand in *Reeder.*

This Court's denial of certiorari in *Pollard* should not prejudice Petitioner's right to reasoned consideration of his petition for writ of certiorari.

II. THE DECISION OF THE EIGHTH CIRCUIT RAISES ISSUES OF NATIONAL SIGNIFICANCE.

Point II of Respondents' Brief is somewhat arcane. Apparently they argue that there are no "special and important reasons" to justify a grant of certiorari per Rule 17 because the classification established by R.S.Mo. §84.830 (1978), does not impact "upon any federally protected interests of individuals within the state." (Respondents' Brief at 7.)

This is a fanciful argument. It can hardly be gainsaid that limitations upon the freedom to make political contributions "implicate fundamental First Amendment interests," *Buckley v. Valeo,* 424 U.S. 1, 23 (1976); *Abood*

v. Detroit Board of Education, 431 U.S. 209, 234 (1977). Since the classification created by §84.830 only burdens the exercise of First Amendment rights by Kansas City police officers, the Equal Protection Clause mandates that the classification be subjected to strict scrutiny, *Carey v. Brown,* 447 U.S. 455, 461-462 (1980).

Respondents argue that the instant cause is important only to members of the Kansas City Police Department and that the Eighth Circuit's decision will not affect anyone other than the parties to this cause. At best Respondents' argument is naive.

The Eighth Circuit's opinion deftly avoids the need to examine the justifications for the disparate treatment imposed under §84.830 by holding that the classification is wholly outside *any* protection under the Fourteenth Amendment because discrimination is imposed on a territorial basis. This is a radical departure from the equal protection cases decided by this Court over the last two decades.[1]

It may be that this Court will ultimately decide that invidious discrimination is permissible if parcelled out on a geographic basis. It is, however, intellectually dishonest to argue that this is an issue of little national importance. A decision on whether or not the states may, consistent with the Equal Protection Clause, accord a lesser measure of First Amendment rights to some groups on the basis of their residence will profoundly shape the contours of future decisions concerning the Fourteenth Amendment. Certiorari should be granted.

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1. This argument is developed more fully in the Petition for Writ of Certiorari and will not be repeated here.

III. SECTION 84.830 VIOLATES THE EQUAL PROTECTION CLAUSE.

A. The Fact That the Invidious Discrimination Practiced Under the Statute Is Imposed on a Geographic Basis Does Not Exempt It From Review Under the Equal Protection Clause.

Respondents resurrect the bromide that the Equal Protection Clause protects people and not places, thereby substituting a slogan for substantive analysis. Much of the argument under Point III A of their brief is answered in the Petition for Writ of Certiorari filed by Petitioner which will not be repeated here.

Petitioner would simply note that no case decided by this Court has ever held that invidious discrimination—i.e. a classification that burdens a suspect class or trammels a fundamental right—is beyond the scope of Fourteenth Amendment strict scrutiny because the discrimination was based on its victim's residence. To the contrary, the notion that a diminished level of fundamental rights can be afforded on the basis that "an individual lives here or there" has been held to be offensive to the Equal Protection Clause, *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

B. Because Section 84.830 Classifies Employees in Terms of Their Ability to Exercise Fundamental Rights, It Is Subject to Strict Scrutiny.

Respondents argue that even if the Fourteenth Amendment does protect against geographic discrimination, §84.830 is not subject to strict scrutiny because this Court must defer to the states when they impose restrictions on political activities by their employees and when they de-

termine to whom such restrictions apply. Respondents' argument is unsound for two reasons.

First, it ignores the limits on deference to the states where classifications are invidiously discriminatory. In *Plyler v. Doe,* 457 U.S. 202 (1982), the Court recognized that States must have substantial latitude in establishing legislative classifications. It also recognized the limits to that latitude:

> But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus, we have treated as presumptively invidious those classifications that . . . impinge upon the exercise of fundamental right.

457 U.S., at 216-217. Respondents cite no case that undercuts the soundness of this principle or which indicates that, insofar as similarly situated groups are concerned, the Equal Protection Clause permits something less than strict scrutiny to uphold invidious discrimination.

The other reason for the unsoundness of Respondents' argument is that they misapprehend the holding of the principal case on which they rely, *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). In that case this Court held that the Fourteenth Amendment permitted classified and unclassified employees of the State of Oklahoma to be treated differently in terms of the political activities in which they could engage. In a footnote the Court upheld that restriction against an equal protection challenge, 413 U.S., at 607 n.5. The Court did not discuss the standard of review it employed.

Petitioner would submit that the footnote in *Broadrick* simply recognized the familiar rule that different groups may be treated differently. As noted in *Plyler v. Doe*, supra:

> The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." [Citation omitted.] But so too, "the Constitution does not require things which are different in fact . . . to be treated in law as though they were the same."

457 U.S., at 216.

The situation in *Broadrick* and the case at bar should be contrasted. In *Broadrick* different groups of employees —classified and unclassified—were treated differently. In contrast §84.830 treats persons who are similarly situated —Kansas City and other Missouri police officers—differently. Section 84.830 is a classic example of a law that transgresses the command of the Equal Protection Clause that "all persons similarly circumstanced shall be treated alike," *Plyler v. Doe*, supra, 457 U.S., at 216. Because of the invidiousness of the legislative classification involved, the reasons offered to justify the discrimination must withstand strict scrutiny.

Significantly, Respondents make no effort to justify §84.830 under a strict scrutiny standard. Presumably, that is so because they recognize that a legislative scheme which accords St. Louis police officers the right to make political contributions while denying that same right to Kansas City police officers can never be shown to be "*necessary* to the achievement of a *compelling* state interest," *Dunn v. Blumstein*, 405 U.S. 331, 342 (1972).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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